APPENDIX

Points and Authorities

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civil Action No. Civ. 2419-71

NEW YORK STATE, on behalf of New York, Bronx and Kings Counties,

Plaintiff,

—against—

UNITED STATES OF AMERICA,

Defendant,

N.A.A.C.P., etc., et al.,

Applicants for Intervention.

The only previous case in which a private party sought to intervene to prevent a state or subdivision from winning exemption from the Voting Rights Act under section 4 thereof is *Apache County* v. *United States,* 256 F. Supp. 903 (D.D.C. 1966).

The Court in *Apache County* set out two criterion the meeting of either of which would wararnt such intervention. The first criterion was the pendency of an action by the applicants to enforce their individual or private rights, such as under 42 U.S.C. § 1983, on which the section 4 action would be legally binding. Such an action is now pending in the United States District Court for the South-

ern District of New York, *N.A.A.C.P., etc., et al.* v. *New York City Board of Elections.*

The second criterion is the failure to the Attorney General to discharge his responsibilities to protect the public interest and to investigate the relevant facts. The most important factor to be considered in judging whether literacy tests discriminate on the basis of race or color is whether there are differences in the literacy rates of whites and non-whites, particularly if they are do to unequal discriminatory public education. *Gaston County* v. *United States,* 395 U.S. 285 (1969). Applicants have alleged just such differences, inequality and discrimination in their proposed complaint,* but it appears from the affidavit of Mr. Norman that the United States at no time inquired whether similar facts to those found in *Gaston County* might have existed in New York at the time when today's illiterate non-white adults were children. The factual investigation vaguely described in Mr. Norman's affidavit falls far short of the thorough investigation in *Apache County* of possible discriminatory applications of literacy tests, and the actual investigations held in this case never included a request for information from applicants, whom the United States knew to be vitally interested in this matter.

This Court is required under the Voting Rights Act to make a determination of fact that New York has not within the last 10 years used any test or device with the purpose or the effect of denying the right to vote on account of race or color. The United States has declined to make a meaningful investigation into the relevant facts and will not present to this Court any information regarding such usages. Applicants for intervention should be permitted to

* This is a typographical error. The accompanying proposed pleading was technically an answer not a complaint, and it was so labeled.

intervene and to offer evidence of such usages to this Court so that it can properly discharge its statutory duties.

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Extract From New York Times Dated February 6, 1972

THE NEW YORK TIMES, SUNDAY, FEBRUARY 6, 1972

LEFKOWITZ ACTS TO BAR VOTING WATCH

State Attorney General Louis J. Lefkowitz said yesterday that he had moved in Federal Court in Washington to have the state exempted from potential Federal supervision over registration and voting in Manhattan, the Bronx and Brooklyn.

Mr. Lefkowitz said he had acted in line with procedures of the Voting Rights Act of 1970, and asserted that the exemption was needed to let the state go ahead with legislative and Congressional reapportionment laws and any other changes involving voting rights.

Discrimination Seen

The state's suit was attacked in a statement yesterday by the Rev. H. Carl McCall, chairman of the Citizens Voter Education Committee; Representative Herman Badillo and Borough Presidents Percy E. Sutton of Manhattan and Robert Abrams of the Bronx.

The four critics declared Federal intervention was needed to end what they called "gross and systematic discrimination in New York."

The 1970 law provides Federal supervision of voting procedures in any county in a state if fewer than 50 per cent of eligibles voted in the 1968 Presidential election. Such requirements have led to use of Federal registrars in the South.

Mr. McCall contended that the former literacy tests had been "applied discriminatorily" here and that people in black and Puerto Rican areas had been deterred from registering by various means, including a lack of Spanish-speaking inspectors.

Extract From New York Times Dated February 6, 1972

The four critics declared that the state petition for exemption had been "quietly filed" in what they called an attempt by the State Attorney General to "cover up voter discrimination."

Mr. Lefkowitz said the four "owe me a public apology." He said the suit had been filed in open court instead of an alternative procedure to ask the United States Attorney General for exemption, which he said might have led to charges of political influence.

He said that he was "ready to show that our literacy test was not used for the purpose of abridging anyone's right to vote for race or color" and that leaders in the city had made special efforts, including extra registration periods and places, to bring out prospective voters.

Letter From New York Civil Liberties Union Dated January 26, 1973

NYCLU

New York Civil Liberties Union, 84 Fifth Avenue,
New York, N.Y. 10011. Telephone 924-7800

Burt Neuborne,
Staff Counsel

January 26, 1973

Eric Schnapper, Esq.
NAACP Legal Defense and Educational
Fund, Inc.
10 Columbus Circle
New York, New York 10019

Dear Mr. Schnapper:

I have received your letter dated January 19, 1973, in which you request information concerning the American Civil Liberties Union's receipt of a copy of the amended complaint in *NAACP* v. *New York*.

Shortly after the appearance of a story in the *New York Times* in February 1972, describing the filing of a suit by New York State to remove itself from the pre-clearance provisions of the Voting Rights Act, I telephoned Mr. George Zuckerman to request a copy of New York's complaint and the Justice Department's answering papers. Mr. Zuckerman immediately forwarded a copy of New York's amended complaint to me and informed me that the Justice Department had requested a lengthy adjournment to consider its position. Since the Justice Department had not yet determined its position in the matter, we deemed consideration of intervention premature.

Letter From New York Civil Liberties Union
Dated January 26, 1973

I heard nothing further concerning the matter, either from New York State or in the press, until May 1972, when the New York State Attorney General's office produced a copy of the unreported consent decree in *NAACP* v. *New York*, in response to my argument in *Socialist Labor Party* v. *Rockefeller*, 72 Civ. 2049 that certain modifications in the New York State Election Law had been enacted in violation of the pre-clearance requirements of the Voting Rights Act.

My office had no notice that the Justice Department consented to the entry of judgment in *NAACP* v. *New York*.

Sincerely yours,

/s/ Burt Neuborne
Burt Neuborne

cc: George Zuckerman

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NEW YORK CITY REGION OF NEW YORK CONFERENCE OF BRANCHES, ET AL. *v.* NEW YORK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 72–129. Argued February 28, 1973—Decided June 21, 1973

Sections 4 and 5 of the Voting Rights Act of 1965, as amended, are designed to prohibit the use of tests or devices, or the alteration of voting qualifications or procedures, when the purpose or effect is to deprive a citizen of his right to vote. Sections 4 and 5 apply in any State or political subdivision thereof which the Attorney General determines maintained on November 1, 1964, or November 1, 1968, any "test or device," and with respect to which the Director of the Census Bureau determines that less than half the voting-age residents were registered, or that less than half voted in the presidential election of that November. These determinations are effective on publication and are not judicially reviewable. Publication suspends the effectiveness of the test or device, which may not then be utilized unless a three-judge District Court for the District of Columbia determines that no such test or device has been used during the 10 preceding years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." The section provides for direct appeal to the Supreme Court. The State or political subdivision may also institute an action pursuant to § 5 in the District Court for the District of Columbia, for a declaratory judgment that a proposed alteration in voting qualifications or procedures "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The statute also permits the change to be enforced without the court proceeding if it has been submitted to the Attorney General and he has not interposed an objection within

Syllabus

60 days. Neither the Attorney General's failure to object nor a § 5 declaratory judgment bars a subsequent private action to enjoin enforcement of the change. Such an action shall also be determined by a three-judge court and is appealable to the Supreme Court. The Attorney General, on July 31, 1970, filed with the Federal Register his determination that New York on November 1, 1968, maintained a test or device as defined in the Act. On March 27, 1971, the Federal Register published the Census Director's determination that in the counties of Bronx, Kings, and New York, "less than 50 per centum of the persons of voting age residing therein voted in the presidential election of November 1968." New York State filed an action on December 3, 1971, seeking a judgment declaring that during the preceding 10 years the three counties had not used the State's voting qualifications "for the purpose or with the effect of denying or abridging the right to vote on account of race or color" and that §§ 4 and 5 were thus inapplicable to the counties. Pursuant to stipulation, the United States filed its answer on March 10, 1972, alleging, *inter alia*, that it was without knowledge or information to form a belief as to the truth of New York's allegation that the literacy tests were not administerd discriminatorily. On March 17, New York filed a motion for summary judgment, supported by affidavits, and on April 3 the United States formally consented to the entry of the declaratory judgment sought by the State. Appellants filed their motion to intervene on April 7. New York opposed the motion claiming that: it was untimely, as the suit had been pending for more than four months, it had been publicized in early February, and appellants did not deny that they knew the action was pending; appellants failed to allege appropriate supporting facts; no appellant claimed to be a victim of voting discrimination; appellants' interests were adequately represented by the United States; delay would prejudice impending elections; and appellants could raise discrimination issues in the state and federal courts. On April 13 the three-judge court denied the motion to intervene and granted summary judgment for New York. While the appeal was pending it was disclosed that the attorney who executed affidavits for appellants had not begun employment with appellant NAACP Legal Defense & Education Fund, Inc., until March 9, 1972, and that Justice Department attorneys met with two individual appellants in January 1972 during the course of their investigation. *Held:*

1. The words "any appeal" in § 4 (a) encompass an appeal by a would-be, but unsuccessful, intervenor, and appellants' appeal properly lies to this Court. Pp. 7–10.

Syllabus

2. The motion to intervene was untimely, and in the light of that fact and all the other circumstances of this case, the District Court did not abuse its discretion in denying the motion. Pp. 18–23.

Affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. DOUGLAS and BRENNAN, JJ., filed dissenting opinions. MARSHALL, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 72–129

National Association for the Advancement of Colored People, etc., et al., Appellants, v. State of New York et al.

On Appeal from the United States District Court for the District of Columbia.

[June 21, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This appeal from a three-judge district court for the District of Columbia comes to us pursuant to the direct-review provisions of § 4 (a) of the Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437, 438, as amended, 42 U. S. C. § 1973b (a).[1] The appellants[2] seek review of

[1] "To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. . . .

"An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the pro-

[*Footnote 2 is on p. 2*]

an order dated April 13, 1972, unaccompanied by any opinion, denying their motion to intervene[2] in a suit that had been instituted against the United States by the State of New York, on behalf of its counties of New York, Bronx, and Kings. New York's action was one for a judgment declaring that, during the 10 years preceding the filing of the suit, voter qualifications prescribed by the State had not been used by the three named counties "for the purpose or with the effect of denying or abridg-

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visions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

"If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment."

[2] The appellants describe themselves, in their motion to intervene, as the National Association for the Advancement of Colored People, New York City Region of New York State Conference of Branches; your duly qualified black voters in Kings County, New York; and one duly qualified Puerto Rican voter in that county. Two of the individual appellants are also members of the New York State Assembly and another is a member of the New York State Senate. App. 44a.

[3] The motion, App. 44a–47a, does not differentiate between intervention of right and permissive intervention, under subdivisions (a) and (b), respectively, of Rule 24 of the Federal Rules of Civil Procedure. Neither does it state that one, rather than the other, is claimed. At oral argument, counsel said that in the District Court the appellants sought intervention of right. Tr. of Oral Arg. 8. In this Court appellants suggest that they were also entitled to permissive intervention. Tr. of Oral Arg. 9; Brief for Appellants 26 n. 39. In view of our ruling on the issue of timeliness, we make no point of the distinction between the two types of intervention.

ing the right to vote on account of race or color," within the language and meaning of § 4 (a), and that the provisions of §§ 4 and 5 of the Act, as amended, 42 U. S. C. §§ 1973b and 1973c, are, therefore, inapplicable to the three counties.

In addition to denying the appellants' motion to intervene, the District Court, by the same order, granted New York's motion for summary judgment. This was based upon a formal consent by the Assistant Attorney General in charge of the Civil Rights Division, on behalf of the United States, consistent with the Government's answer theretofore filed, "to the entry of a declaratory judgment under Section 4 (a) of the Voting Rights Act of 1965 (42 U. S. C. 1973b (a))," App. 39a. The consent was supported by an accompanying affidavit reciting, "I conclude, on behalf of the Acting Attorney General that there is no reason to believe that a literacy test has been used in the past 10 years in the counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances which have been substantially corrected and which, under present practice cannot reoccur." App. 42a–43a.

Appellants contend here that their motion to intervene should have been granted because (1) the United States unjustifiably declined to oppose New York's motion for summary judgment; (2) the appellants had initiated other litigation in the United States District Court for the Southern District of New York to compel compliance with §§ 4 and 5 of the Act; and (3) the appellants possessed "substantial documentary evidence," Juris. Statement 7, to offer in opposition to the entry of the declaratory judgment.

Faced with the initial question whether this Court has jurisdiction, on direct appeal, to review the denial of the appellants' motion to intervene, we postponed

determination of that issue to the hearing of the case on the merits. 409 U. S. 978 (1972).

I

Section 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973,[4] clearly indicates that the purpose of the Act is to assist in the effectuation of the Fifteenth Amendment, even though that Amendment is self-executing, and to insure that no citizen's right to vote is denied or abridged on account of race or color. *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966); *Apache County* v. *United States*, 256 F. Supp. 903 (DC 1966). Sections 4 and 5, 42 U. S. C. §§ 1973b and 1973c, are designed to prohibit the use of tests or devices, or the alteration of voting qualifications or procedures, when the effect is to deprive a citizen of his right to vote. Section 4 (c) defines the phrase "test or device" to mean

> "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U. S. C. § 1973b (c).

Section 4 (b), as amended, now applies in any State or in any political subdivision of a State which the Attorney General determines maintained on November 1, 1964, or November 1, 1968, any "test or device," and with respect to which the Director of the Bureau of the Census de-

[4] "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

termines that less than half the residents of voting age there were registered on the specified date, or that less than half of such persons voted in the presidential election of that November. These determinations are effective upon publication in the Federal Register and are not reviewable in any court. 42 U. S. C. § 1973b (b).

The prescribed publication in the Federal Register suspends the effectiveness of the test or device, and it may not then be utilized unless a three-judge district court for the District of Columbia determines, by declaratory judgment, that no such test or device has been used during the 10 years preceding the filing of the action "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." § 4 (a); 42 U. S. C. § 1973b (a). The same section states that "any appeal shall lie to the Supreme Court." And the District Court "shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color."

Section 5, 42 U. S. C. § 1973c, applies whenever a State or political subdivision with respect to which a determination has been made under § 4 (b) "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on November 1, 1964, or November 1, 1968.[5] The state or political subdivision may then institute an action in the United States District Court for the District of

[5] In *Georgia* v. *United States*, — U. S. — (1973), the Court held that a State's reapportionment plan, which has the potential for diluting Negro voting power, is a "standard, practice, or procedure with respect to voting," within the meaning of § 5 of the Act. See *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969).